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(1)

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

REDERIET OTTO DANIELSEN, A.S.; K.S. ARIES SHIPPING,
Petitioners,

v.

BRIAN STACY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 10, 2010

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT'S CURRENT DEFINITION OF "ZONE OF DANGER," WHICH HAS NO LIMIT IN TIME AND SPACE, FATALLY CONFLICTS WITH THIS COURT'S DECISION TO LIMIT EMOTIONAL DISTRESS CLAIMS TO AVOID INFINITE AND UNPREDICTABLE LIABILITY FOR DEFENDANTS.

2. WHETHER THE NINTH CIRCUIT'S DECISION TO EXPAND THE NUMBER OF POTENTIAL CLAIMS FOR EMOTIONAL DISTRESS, PLACES IT IN DIRECT CONFLICT WITH THE THIRD, THE FIFTH, AND THE ELEVENTH CIRCUIT COURTS, AND AN EARLIER DECISION OF THE NINTH CIRCUIT.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Rederiet Otto Danielsen, A.S. is a wholly owned subsidiary of Tschudi Shipping Company AS. Petitioner K.S. Aries Shipping is a privately held company, with no publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION . . . 7

I. The Ninth Circuit Has Failed to Follow This Court's Recognition of the Need To Limit the Number of Claims For Emotional Distress . 8

II. The Ninth Circuit's Expansion of the Zone of Danger Test Conflicts With Decisions of the Third, Fifth and Eleventh Circuits, and a Prior Decision of the Ninth Circuit 12

A. Third Circuit 12

B. Fifth Circuit 14

C. Eleventh Circuit 15

D. Ninth Circuit 16

CONCLUSION 18

APPENDIX

Appendix A: Opinion, United States Court of Appeals for the Ninth Circuit, (June 29, 2010) 1a

Appendix B: Order Granting Motion to Dismiss Plaintiff Brian Stacy's Claims, In the United States District Court for the Northern District of California, (January 15, 2009) 29a

Appendix C: Order Granting Plaintiff Brian Stacy's Motion for Entry of Judgment and Certification for Appeal, United States District Court for the Northern District of California, Oakland Division, (March 11, 2009) 40a

Appendix D: Order, United States Court of Appeals for the Ninth Circuit, (August 12, 2010) 44a

Appendix E: First Amended Complaint For Damages for Maritime Personal Injury, United States District Court for the Northern District of California, Oakland Division, (October 10, 2008) 46a

Appendix F: Notice of Intent Not to Amend, United States District Court for the Northern District of California, Oakland Division, (January 25, 2009) 56a

TABLE OF AUTHORITIES

CASES

Chan v. Society Expeditions, Inc.,
39 F.3d 1398 (9th Cir. 1994) 3, 5, 6, 16

Consolidated Rail Corp. v. Gottshall,
512 U.S. 532 (1994) ..... *passim*

Gaston v. Flowers Transp.
866 F.2d 816 (5th Cir. 1989) 14, 15

Gottshall v. Consolidated Rail Corporation,
56 F. 3d. 530 (3d Cir. 1995) 13, 14

Kelly v. Bass Enters. Prod. Co.,
17 F. Supp. 2d 591 (E.D. La. 1998) 14

Metro-N. Commuter R.R. Co. v. Buckley,
521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560
(1997) 5, 8, 10, 11

Norfolk & W. Ry. Co. v. Ayers,
538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261
(2003) 5, 8, 11, 12, 15

Tassinari v. Key West Water Tours, L.C.,
480 F. Supp. 2d 1318 (S.D. Fl. 2007) 15, 16

Tobin v. Grossman,
24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d
554 (1969) 9, 10

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1332(a)(2) 3

28 U.S.C. §1333(1) 3

OTHER

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 54 (5th. Ed. 1984) 9

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-28a) is reported at 609 F.3d 1033. The opinion of the district court (App., *infra,* 29a-39a) is unreported but can be found at 2009 U.S. Dist. LEXIS 2719, 2009 A.M.C. 237 (N.D. Cal. 2009).

JURISDICTION

The court of appeals' judgment was entered on June 29, 2010. A timely filed petition for a hearing *en banc* was denied on August 12, 2010 (App. *infra*, 44a-45a). An Application for Extension of Time to File a Petition for Writ of Certiorari was filed on October 22, 2010. Justice Kennedy extended the time to file the Petition to December 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case raises the important question of whether claims for emotional distress should be limited. It arises from a tragic accident involving a fisherman at sea.

Respondent Stacy was the owner and operator of a 32-foot commercial fishing vessel called the *Marja*. In the afternoon of July 13, 2007, the *Marja* was fishing for salmon in the waters off the Point Reyes National Seashore, north of San Francisco. The *Marja's* trolling gear was deployed, which restricted its ability to

maneuver. The *Marja* was underway, proceeding at about 3 miles per hour.

The *Marja* was one of a fleet of fishing vessels in the area at the time. Also fishing was Paul Wade aboard his vessel the *Buona Madre*. Dense fog reduced visibility in the area to "near zero."

At about the same time, the 291-foot commercial freighter *Eva Danielsen*, owned and operated by the Petitioners, left San Francisco Bay and headed toward Portland, Oregon.

At approximately 5 p.m., Stacy detected a "large radar contact" approximately one mile away that appeared to be on a collision course with the *Marja*. The U.S. Coast Guard identified that vessel as the *Eva Danielsen*. Stacy established radio contact with a member of the crew of the *Eva Danielsen*. The *Eva Danielsen* then "initiated evasive action by altering course to avoid" the *Marja*.

Using his radar, Stacy watched as the *Eva Danielsen* passed by his vessel. The fog was too dense for him to see that ship, but he alleged that he heard its engine and felt its wake.

Stacy then alleges that the *Eva Danielsen* proceeded to collide with the *Buona Madre*, for he learned "On or about July 17, 2008, and thereafter" (i.e. at least four days later), that the *Buona Madre* had sunk and its owner Paul Wade found deceased in the water.

Some time after passing Stacy's boat, the *Eva Danielsen* reported to the Coast Guard that it may

have collided with a fishing vessel. Stacy joined the *Eva Danielsen* in the search for any evidence of a collision, or persons in the water. During this time, Stacy heard radio communication expressing a belief that the *Marja* had been involved in the collision. Stacy advised all that his vessel had not been struck. The Coast Guard subsequently suspended the search and told the *Eva Danielsen* that it could proceed to Oregon. Stacy resumed fishing.

Stacy filed his complaint against Petitioners alleging a single claim for negligent infliction of emotional distress. He alleged jurisdiction under diversity of citizenship, 28 U.S.C. §1332(a)(2) and general maritime law, 28 U.S.C. §1333(1). Stacy alleged that he "was placed in grave and imminent risk of death or great bodily harm, and as a result suffered...great physical, mental, and nervous pain and suffering, stress and anxiety...."

Stacy never alleged that he saw, heard, felt or in any other manner perceived the alleged collision between the *Buona Madre* and the *Eva Danielsen*. Neither did he allege that he knew that the *Buona Madre* was in the area fishing that day, nor that he knew its owner Paul Wade.

Petitioners filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motion by following *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994). It noted that Stacy could not pursue a claim for emotional distress under the "physical impact" or "relative bystander" test. Thus, it carefully considered the remaining "zone of danger" test, before concluding that Stacy still could not state

a claim because he did not witness another being seriously injured, or killed, while simultaneously being threatened with physical injury to himself.

The district court granted Stacy leave to amend his complaint to state a cause of action. However, Stacy filed his Notice of Intent Not to Amend his complaint. (App. *infra*, 55a-56a). He then filed his appeal.

The majority opinion of the court of appeals recognized that the federal standard for claims alleging negligent infliction of emotional distress was contained in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994). Their opinion states:

> In *Gottshall*, the Supreme Court held that "the zone of danger" test allowed recovery for "those plaintiffs who sustain a *physical impact* as a result of a defendant's negligent conduct, *or* who are placed in *immediate* risk of physical harm by that conduct." 609 F.3d at 1035 (Emphasis added.)

However, the majority then concluded: "Stacy alleged that he was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent action of the defendants. Nothing more was required to assert a cause of action cognizable under maritime law." *Id.*

The majority agreed with a hypothetical posited in the dissent which states that, as a result of the majority opinion, all the passengers in dozens, if not hundreds, of vehicles could pursue claims for emotional distress arising from an accident on a foggy stretch of a California highway. 609 F.3d at 1035. The

majority further agreed that the zone of danger test arose from "near-miss" automobile accident cases. *Id.*

The majority noted that in two subsequent decisions this Court had not "abandoned its statement of the tort inflicted by creating a zone of danger":

> *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 430, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) ("*immediate risk* of physical harm" created by the defendant's conduct); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003) ("those who escaped *instant physical harm*, but were 'within the zone of danger of physical impact' "). 609 F.3d at 1036. (Emphasis added.)

The majority stated that its decision in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th. Cir. 1994) was not relevant, nor controlling on the issue of whether Stacy's complaint was adequate. To the contrary, the dissenting opinion of Judge Hall concluded that the *Chan* decision was binding precedent. The dissent states:

> What the majority overlooks in suggesting that the "zone of danger" theory articulated in *Chan* is mere dictum, however, is that the panel in that case apparently believed it *was* necessary to define the legal contours of a claim of NIED under each of the three theories, to be applied by the district court as to Victoria Chan's NIED claim after affording her a chance to amend her complaint in light of the panel's decision. *Id.* Thus, I believe the "zone of danger" test articulated in *Chan* has binding precedential

> force in this circuit, provides the rule of decision for this case, and we are not free to ignore it. 609 F.3d at 1040-41.

The dissent quoted from the *Chan* decision which states that "[w]e next must decide the threshold standard that must be met by plaintiffs bringing claims" for negligent infliction of emotional distress. 609 F.3d at 1040. The *Chan* panel looked to state common law, as "instructed" by this Court in *Gottshall*, when it concluded that witnessing harm to another, while being threatened with harm, satisfies the zone of danger test. *Id.*

Not only could Stacy not plead that he witnessed harm to another as required by *Chan*, the dissent noted that:

> Stacy's pleading falters because he has failed adequately to allege that he suffered "fright" or "shock" or any other type of severe emotional distress as a result of appellees' negligent conduct while he was in the "zone of danger." Indeed, and contrary to the majority's assertion, Stacy does *not* allege that he suffered "fright" or "shock" at all--neither as the *Eva Danielsen* approached the *Marja* on a collision course, nor as it passed the *Marja* "at close quarters," nor when he heard reports that it had run down a boat in the fishing fleet, nor when he eventually learned that it had run down the *Buona Madre* and killed its captain. Rather, Stacy only vaguely claims that the entire course of events, from the moment he detected the *Eva Danielsen* on his radar until four days later, when he learned the freighter had run down the *Buona*

> *Madre* and killed Wade, caused him to suffer severe emotional distress. 609 F.3d at 1044.

The dissent recognized that Stacy, and all the other fishermen who were in the dense fog on the day in question, may have suffered psychic trauma, or "survivor's guilt," after learning of Wade's death. But even if that were true, the dissent noted:

> Stacy has not alleged that he suffered fright or shock or severe emotional distress as a result of any "*immediate* traumatic harm" caused or threatened by his "near miss" with the *Eva Danielsen* while he was in the "zone of danger" created by appellees' negligent conduct--such as might have resulted if he had witnessed Wade's death. To the contrary, Stacy acknowledges that after he notified the Coast Guard and his fellow fishermen that he and the *Marja* were safe and sound, he returned to business as usual, and resumed fishing. 609 F.3d at 1044-45. (Emphasis added.)

The dissent concluded by stating: "...I believe the majority conceives of a much more *expansive* 'zone of danger' test than has been recognized to date by the Supreme Court, this court, or any other jurisdiction that has adopted that test." 609 F.3d at 1045. The dissent also stated that the zone of danger must be defined "in both geographic and temporal terms...." *Id.* at 1046.

REASONS FOR GRANTING THE PETITION

If allowed to stand, the Ninth Circuit decision would result in significantly expanding the amount of

litigation over claims alleging emotional distress. The majority decision is contrary to the decisions of this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), *Metro-N Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) and *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

The majority opinion of the Ninth Circuit concedes that its new definition of the "zone of danger" test significantly expands the number of individuals who could pursue a claim for emotional distress, (*see*, 609 F. 3d at 1035 n2, at 1045 n6.), it ignores the state common law that this Court carefully considered in *Gottshall*, and it is in conflict with decisions in other Circuits. In sum, the majority opinion merits review by this Court.

I. The Ninth Circuit Has Failed to Follow This Court's Recognition of the Need To Limit the Number of Claims For Emotional Distress

The majority's three page opinion ignores the exhaustive review and consideration given by this Court to claims for emotional distress in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). This Court proceeded to instruct the lower courts how to handle these claims because of "the very real possibility of nearly infinite and unpredictable liability for defendants." 512 U.S. at 546. The majority opinion disregarded this important point.

The majority opinion is amazing in several respects. It pays lip service to the fact that the *Gottshall* opinion provides the federal standard for claims for negligent infliction of emotional distress,

and that its "zone of danger" test allows recovery for those plaintiffs "who sustain a *physical impact* as a result of a defendant's conduct, or who are placed in *immediate risk* of physical harm by that conduct." 609 F.3d at 1034. (Emphasis added.) But then it states that all Stacy was required to plead was that he was in the zone of danger and suffered emotional distress. The majority ignored the requirements of physical impact or immediate risk.

This Court found that there has been a "particularly significant" concern in the courts about recognizing a cause of action for an emotional injury not related to physical trauma, because liability may be imposed for highly remote consequences of a negligent act. "Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them." *Gottshall*, 512 U.S. at 545.

It is because of the possibility of infinite and unpredictable liability that the courts have placed substantial limits on the class of plaintiffs that may recover for emotional injuries. In quoting from W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 54, p. 366 (5th. Ed. 1984), this Court agreed that it would be an unreasonable burden on a defendant who, if he endangered another, was compelled "to pay for the lacerated feelings" of every other person disturbed by reason of it, including every "bystander shocked at an accident," and every distant relative and friend. 512 U.S. at 546 n5.

This Court quoted from *Tobin v. Grossman*, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554 (1969) which stated: "Every injury has ramifying consequences, like the ripplings of the waters, without

end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." 24 N.Y.2d at 619, 249 N.E.2d at 424. The majority decision in *Stacy* has mistakenly included into its expanded zone of danger all of the boats touched by the rippling water caused by the wake of the *Eva Danielsen*.

In *Metro-N Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) this Court addressed the issue of whether an employee could recover for negligently inflicted emotional distress caused by exposure to asbestos. The decision focused on what was meant by the words "physical impact." Nonetheless, that decision is still instructive.

This Court concluded in *Buckley* that physical impact did not include simple physical contact with a substance that might cause a disease at a *substantially latter time* where that substance threatens no harm other than disease related risk. It noted that in *Gottshall*, when citing to state cases to support its zone of danger test, in every state case "where recovery for emotional distress was permitted, the case involved a threatened physical contact that caused, or might have caused, *immediate* traumatic harm." 521 U.S. at 430. (Emphasis added.) Thus, the time of the impact and the time of the actual harm, are important considerations in limiting these claims. The majority opinion in *Stacy* took no account of the time of the alleged harm, nor the fact that there was no impact.

The *Buckley* decision re-emphasized the general policy reasons referred to in *Gottshall* for restricting recovery for emotional harm. Those reasons, namely "(a) special 'difficulty for judges and juries' in

separating valid, important claims from those that are invalid or 'trivial...," "(b) a threat of 'unlimited and unpredictable liability,'..."and (c) the 'potential for a flood' of comparatively unimportant, or trivial,' claims,..." all militate against expanding the zone of danger to include claims that do not arise until days after the negligent act. 521 U.S. at 433. The Ninth Circuit completely ignored those considerations when it expanded the zone of danger.

The *Buckley* decision recognized the need to carefully look at the evidence in "separating valid from invalid emotional injury claims..." 521 U.S. at 434. To the contrary, the majority opinion of the Ninth Circuit did not even acknowledge the fact that Stacy's alleged distress occurred four days "and thereafter" the alleged negligent act.

In denying recovery in *Buckley*, this Court was sympathetic to the plaintiff who had suffered wrong at the hands of a negligent defendant. However, it was "more troubled" by the "potential systemic effects of creating a new, full-blown, tort law cause of action..." 521 U.S. at 443. To the contrary, the majority opinion in *Stacy* creates the new tort of *delayed* negligent infliction of emotional distress.

This Court's decision in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) provided further guidance. It said that *Gottshall* and *Metro-North* describe two categories of claims for emotional distress damages: Stand-alone emotional distress claims not provoked by any physical injury, for which *recovery is sharply circumscribed* by the common law zone-of-danger test; and emotional distress claims brought on by a physical

injury, for which pain and suffering recovery is permitted. 538 U.S. at 147.

The *Ayers* decision further limited such claims by stating that the zone of danger test:

> confines recovery for stand-alone emotional distress claims to plaintiffs who: (1) "sustain a physical impact as a result of a defendant's negligent conduct"; or (2) "are placed in immediate risk of physical harm by that conduct" – *Id.* at 146.

To the contrary, the majority opinion in *Stacy* significantly expanded the zone of danger in terms of time and space to enable Stacy – who was neither impacted nor placed in immediate risk of harm - to pursue his claim.

It is clear from the prior decisions of this Court that the focus must be on limiting the number of claims for emotional distress that may be pursued in the federal courts. A properly applied zone of danger test satisfies that need. The expanded zone of danger prescribed by the majority in *Stacy* has the exact opposite effect.

II. The Ninth Circuit's Expansion of the Zone of Danger Test Conflicts With Decisions of the Third, Fifth and Eleventh Circuits, and a Prior Decision of the Ninth Circuit

A. Third Circuit

In remanding the *Gottshall* case to the Third Circuit, it was told to reconsider the negligent infliction of emotional distress claim under the

common law zone of danger test. Gottshall had rushed to the aid of his friend of 15 years, who had collapsed due to strenuous work on an "oppressively hot" and humid day. Gottshall realized that his friend was having a heart attack, and being the only one with the training began administering CPR. His friend died due to the inability to obtain timely medical assistance.

Gottshall returned to work at the same site, and began to fear a heart attack. He became distraught and "[a]fter a few days" secluded himself at home, and then later checked himself in to a psychiatric hospital. He was diagnosed with major depression and post-traumatic stress disorder.

In denying Gottshall's claim, the Third Circuit on remand noted that if the zone of danger test required an impact, or threat of impact, then Gottshall was not in the zone. *Gottshall v. Consolidated Rail Corporation*, 56 F. 3d. 530, 535 (3d Cir. 1995). The court held that the sun's rays and the heated air did not constitute an impact.

That court then considered whether Gottshall was placed in immediate risk of physical harm. It found that Gottshall had been working within the conditions of heat, humidity, etc. that were expected at the time. As a result, the court concluded that Gottshall's physical working conditions were not "extreme and dangerous enough as to place this plaintiff in immediate risk of physical harm." *Id.* In a footnote, the court also found it significant that Gottshall "...cannot show that he perceived any threat of physical harm during the time..." of the negligent act, "nor can he show that a negligent act was committed

..." during the time when he feared a heart attack. 56 F.3d at 535 n7.

If Stacy had filed his lawsuit in the Third Circuit it would have been dismissed. Stacy's working condition of near zero visibility, while watching another vessel pass by on radar, while fishing with others, certainly did not place him in fear and danger at the time of defendants' alleged negligent act. Stacy kept his fishing gear out, and resumed fishing when the *Eva Danielsen* passed. Further, as alleged, his fear was not "immediate;" rather it arose four days later "and thereafter." The Third Circuit is aligned with the dissenting opinion of Judge Hall in *Stacy*.

B. Fifth Circuit

The decision in *Kelly v. Bass Enters. Prod. Co.*, 17 F. Supp. 2d 591 (E.D. La. 1998) provides a good example of a plaintiff within the zone of danger. Plaintiff and his brother were in a fishing boat when it allided with a structure in a canal. Plaintiff's brother was killed. At the time of the allision, plaintiff was "within several feet of his brother," saw his brother's injuries and "began life-saving efforts to no avail." The court held that Plaintiff was "certainly within the zone of danger and thus is not foreclosed from bringing a claim based on the general maritime law." 17 F. Supp. at 598. He was within feet of impact at the time of the negligent act, and he had an immediate reason to be fearful.

Similarly, in *Gaston v. Flowers Transp.* 866 F.2d 816 (5th Cir. 1989), Plaintiff saw his brother crushed between two colliding vessels. He tried to save his brother and he bruised his elbow when he fell to the

deck; however, he did not consider himself to be in danger. He later suffered from post-traumatic distress disorder. He argued that he could recover for this purely emotional injury because he was within the "zone of danger." In this pre-*Gottshall* case, the court consulted Louisiana common law for guidance, which allowed recovery for those within the zone of danger, "but [plaintiff] made no showing that he even thought himself to be in danger. Neither his deposition nor his answers to interrogatories indicate that he was concerned that *he* might be harmed when [his brother] was caught between the barges." 866 F.2d at 820. Thus, he was denied recovery because he was never threatened with immediate harm. This holding comports with *Gottshall's* later zone-of-danger test requiring that plaintiff at least be in imminent danger of harm.

C. Eleventh Circuit

The court in *Tassinari v. Key West Water Tours, L.C.*, 480 F. Supp. 2d 1318 (S.D. Fl. 2007) denied recovery to a mother who, while on a water craft, saw her daughter injured on another water craft, and rendered aid. The plaintiff was not injured, nor threatened with immediate harm. In its ruling, the Eleventh Circuit recognized that this Court's decision in *Norfolk and Western Ry. Co. v. Ayers*, *supra*, demonstrates a much more restrictive policy toward stand-alone claims for emotional distress. It also noted that this Court found the common law tests and restrictions on recovery for negligent infliction of emotional distress to be generally valid and reasonable since they prevent the flood of trivial suits, reduce the number of fraudulent claims, and reduce the specter of

unlimited and unpredictable liability. 480 F.Supp. 2d at 1324.

As stated above, this is contrary to the approach taken by the majority in the *Stacy* decision. That opinion allows Stacy's stand–alone claim to proceed while significantly expanding the time and space within which such claims can arise to include someone not impacted, nor immediately threatened by impact.

D. Ninth Circuit

The majority in *Stacy* said they did not need to follow the decision in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) because that decision did not chose among the three tests for emotional distress since the plaintiffs could not recover under any of them. However, the *Chan* court remanded the case to the trial court for further fact-finding, if warranted, and to decide which test to apply to the claim of Victoria Chan. *Id.* at 1410. Thus, the *Chan* court's decision to further limit recovery for stand-alone claims under the zone of danger test to those who witnessed harm to another was one of the guidelines for the trial court to follow. As pointed out by the dissent in *Stacy*, the *Chan* decision is binding precedent until overturned by this Court, or by the Ninth Circuit *en banc*.

Even if the majority in *Stacy* is correct, and plaintiff was not required to "witness" harm to Paul Wade, Stacy still failed to allege that he suffered "fright" or "shock," or any other type of distress while in the zone of danger. The first distress Stacy felt was at least four days after the alleged negligent act

occurred. Stacy was not exposed to any "immediate traumatic harm."

As noted by Judge Hall in the dissent, the majority in *Stacy* has chosen to ignore the guidance of this Court, and over 100 years of common law development, by proceeding to expand the zone of danger test to enable plaintiffs – days and miles removed from a negligent act - to pursue claims for emotional distress. This Court has granted certiorari on three occasions in the last 16 years to provide guidance to the lower courts in how to be fair, yet restrict the growth of these claims. If allowed to stand, the majority decision in *Stacy* will lead to significantly more fraudulent, invalid and trivial claims being pursued for emotional injury, all to the detriment of the judicial system that this Court is required to preserve.

CONCLUSION

The Petitioners Rederiet Otto Danielsen A.S. and K. S. Aries Shipping ask that the petition for a writ of certiorari be granted so this Court may review the judgment of the Ninth Circuit.

Respectfully submitted,

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December 10, 2010

APPENDIX

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TABLE OF CONTENTS

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15579
D.C. Nos.
4:07-cv-05487-CW
08-cv-03586-CW

[Filed June 29, 2010]

BRIAN STACY,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
REDERIET OTTO DANIELSEN, A.S.;	)
K.S. ARIES SHIPPING,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted March 10, 2010[1]
San Francisco, California

[1] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Filed June 29, 2010

Before: Cynthia Holcomb Hall, John T. Noonan and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Noonan;
Dissent by Judge Hall

COUNSEL

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James J. Tamulski, Emard Danoff Port Tamulski & Paetzold LLP, San Francisco, California, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

Dense fog off of Point Reyes, California, "the foggiest point on the Pacific coast." K. Goodwin, *Point Reyes Visions* (2008). A covey of fishing vessels trolling for salmon in the fog. Afternoon, July 13, 2007, M/V *Eva Danielsen* departs San Francisco loaded with cargo destined for Portland. The *Eva Danielsen* is 291 feet in length and has a dead weight of 4,286 tons. Among the covey of fishing vessels is the *Marja*, owned and operated by Brian Stacy. At 5 P.M., the radar of the *Marja* picks up the *Eva Danielsen*, one mile away, headed to the *Marja* on a collision course. The *Marja* signals the danger to the freighter. The *Eva Danielsen* avoids hitting the *Marja* but comes close enough for

Stacy to hear her engine and machinery and to feel the vessel's wake. She passes at close quarters.

Having passed the *Marja*, the *Eva Danielsen* collides with the F/V *Buona Madre*. The collision destroys the fishing vessel and results in the death of her captain, Paul Alan Wade. This lawsuit followed from these events.

PROCEEDINGS

Brian Stacy brought this suit against the owners and operators of the *Eva Danielsen* for the negligent infliction of emotional distress. Stacy alleged that the freighter was proceeding at an unsafe speed without a proper lookout, proper radar equipment, or proper signals in violation of the International Navigation Rules Act. Stacy alleged that this action put him in grave and imminent risk of death or great bodily harm, impacting him emotionally so that he could not work and needed psychiatric help.

On motion of the defendants, the district court dismissed Stacy's first amended complaint for failure to state a cause of action. The court stated:

> The Court concludes that, because very few jurisdictions employ a zone of danger test that lacks a "witnessed harm" requirement, even if a maritime [negligent infliction of emotional distress (NIED)] claim may be brought under a zone of danger theory, the claim must be premised on the plaintiff's having experienced a "psychic injury" by "witnessing another being seriously injured or killed," *Chan* [*v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1408 (9th cir.

> 1994)] (emphasis omitted), while simultaneously being threatened with physical injury to him or herself. The Court will thus evaluate Plaintiff's allegation of NIED under *Chan*'s formulation of the zone of danger test.

Stacy appeals.

ANALYSIS

Jurisdiction is based on federal maritime jurisdiction of torts committed on the high seas. 28 U.S.C. § 1333(1). We disregard as erroneous and irrelevant Stacy's alternative jurisdictional theory of diversity of citizenship.

We review de novo the dismissal. *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009). We accept as true facts alleged and draw inferences from them in the light most favorable to the plaintiff. *Id.* The sufficiency of the complaint is governed by the general maritime law of the United States. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994). The federal standard for the negligent infliction of emotional distress is provided by *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48 (1994).

[1] Under this test, applicable in the maritime jurisdiction of the United States, a tort is committed by a defendant subjecting a plaintiff to emotional harm within "the zone of danger" created by the conduct of the defendant. *Id.* In *Gottshall*, the Supreme Court held that "the zone of danger" test allowed recovery for "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are

placed in immediate risk of physical harm by that conduct." *Id.* The Supreme Court went on to quote a law review article's exposition: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.' " *Id.* at 548 (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm*, 34 U. Fla. L. Rev. 447, 489 (1982)).

[2] Stacy alleged that he was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent action of the defendants. Nothing more was required to assert a cause of action cognizable under maritime law.[2]

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[2] The dissent is based on the proposition that the zone of danger test requires a plaintiff to witness harm to another person, rejecting the mine-run cases where the plaintiff is the direct victim of negligent conduct. The zone of danger test, however, only came to accommodate bystanders after many years of doctrinal development. *See, e.g.*, *Jarrett v. Jones*, 258 S.W.3d 442, 445 (Mo. 2008). The dissent relies on our decision in *Chan* as though it adopted the witness test as exclusive. Judge Goodwin wrote for the panel in *Chan*: "at issue here is the *psychic injury* that comes from *witnessing* another being seriously injured or killed." 39 F.3d at 1408. The panel did not address the case where a plaintiff suffers psychic damage from a direct encounter.

Failure to distinguish between direct and derivative emotional harm undermines the dissent. The dissent relies on a passage from *Gottshall* rejecting the Third Circuit's "foreseeability" test. Nothing in this passage imposes a "witnessed harm" requirement for claims of direct emotional harm.

The dissent also relies on two annotations. The first bears the title, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of*

Danger, 89 A.L.R. 5th 255 (2010) (underline added). Given the title of this annotation, it is unsurprising that the cases therein only involve "witnessed harms." A book titled *New York Skyscrapers* will likely not discuss the Sears Tower or Taipei 101. We would err, of course, to conclude that these structures do not exist. The second annotation simply does not support the dissent's position; it contains ample authorities applying the zone of danger test to direct victims, not only bystanders. *See Recovery for Negligent or Intentional Infliction of Emotional Distress Under Jones Act (46 U.S.C.A. Appx. § 688) or Under Federal Employers' Liability Act (45 U.S.C.A. §§ 51 et seq.)*, 123 A.L.R. Fed. 583 § II.A.3 (2010) (citing, *inter alia*, *Hall v. Norfolk S. Ry. Co.*, 829 F. Supp. 1571, 1576 (N.D. Ga. 1993) ("A majority of jurisdictions now use the 'zone of danger' rule, which permits recovery for emotional injuries resulting from witnessing physical harm to another *or* from fearing physical harm to oneself.")).

The dissent repeats its fallacy by relying on two cases that purportedly "formulate the 'zone of danger test' as including a 'witnessed harm' requirement." Dis. Op. 9424. By their own terms, those cases addressed "negligent infliction of emotional distress *upon injury to a third person*." *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 600 (Mo. 1990) (emphasis added); *see Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (applying the zone of danger test to "a *bystander* who is in the zone of physical danger" (emphasis added)).

The dissent's "not-so hypothetical" scenario is vivid and thought-provoking. It underscores the dissent's faulty rationale. The dissent envisions a speeding motorist who nearly collides with "dozens, perhaps hundreds of other vehicles" over a two-hundred mile stretch of highway. Dis. Op. 9428. At the end of this distance, the motorist dramatically collides with a big rig. *Id.* at 9427-28. The "dozens, perhaps hundreds of other vehicles" could potentially prevail against the speeding motorist under a zone of danger theory, assuming they each suffered emotional distress from their own near-collisions. *See, e.g.*, *Wooden v. Raveling*, 71 Cal. Rptr. 2d 891 (Ct. App. 1998); *see also Camper v. Minor*, 915 S.W.2d 437, 442 (Tenn. 1996) (noting that the zone of danger test "arose primarily from 'near-miss' automobile accident cases"). The

[3] The Supreme Court has not abandoned its statement of the tort inflicted by creating a zone of danger. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 430 (1997) ("immediate risk of physical harm" created by the defendant's conduct); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146 (2003) ("those who escaped instant physical harm, but were 'within the zone of danger of physical impact' "). As would be expected, the Ninth Circuit has followed this standard. *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1082 (9th Cir. 2003).

The dissent cites cases in which various state courts defined the zone of danger by reference to the plaintiff being the witness of an accident to someone else. *Gottshall* cited those cases. It did not endorse them. *Gottshall* explicitly stated that the zone included a plaintiff "placed in immediate risk of physical harm."

Chan tells us how we have maritime jurisdiction of a claim for the tortious infliction of emotional injury. It is otherwise not instructive here. Judge Goodwin, writing for the panel in *Chan*, stated: "at issue here is the psychic injury that comes from witnessing another being seriously injured or killed." 39 F.3d at 1408

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vehicles sufficiently near the final collision with the big rig may possibly recover as bystanders. *Cf., e.g., Zea v. Kolb*, 613 N.Y.S.2d 88, 88 (App. Div. 1994); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980). Yet under the dissent's approach, the most obvious candidate for recovery—the driver of the big rig—would have no claim against the speeding motorist. After all, the driver of the big rig did not witness any collision between the speeding motorist and a third party; the driver of the big rig was the direct victim of negligent conduct, and under the dissent's view, his claim is foreclosed by *Chan*.

(emphasis omitted). After setting out its understanding of the various tests for the tort at issue, the court declared: "it is clear that we need not decide which test to adopt today to decide this appeal. None of these theories allows recovery for emotional distress when the plaintiff was not present at the accident scene." *Id.* at 1409.

[4] Nothing in *Chan* addresses a claim of emotional damages by a person directly endangered by a vessel. Nothing in *Chan* purports to refine or reject the teaching of the Supreme Court in *Gottshall*. Nothing in *Chan* is relevant to the adequacy of Stacy's complaint.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

HALL, Circuit Judge, dissenting:

The majority's dramatic rendering of the events that led to the tragic death of plaintiff Brian Stacy's fellow fisherman, Paul Wade, omits certain important facts. The majority also refuses to follow binding circuit precedent, *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), in which a three-judge panel of this court defined the contours of the "zone of danger" test for claims of negligent infliction of emotional distress ("NIED") under general maritime law, and announced a formulation of that test which is well grounded in state common law, appropriate to the maritime context, and consistent with Supreme Court

precedent regarding claims of NIED under federal common law. *Id.* at 1408-09.

Under the *Chan* formulation of the "zone of danger" test—which is the only one of the three major common law tests defining the class of plaintiffs who can recover damages for NIED that even arguably applies in this case—recovery of damages for NIED is allowed without proof of any physical impact or injury to the plaintiff, so long as he or she: (1) witnessed peril or harm to another, and (2) was also threatened with physical harm as a consequence of the defendant's negligence. *Id.* at 1409. I believe we are bound by *Chan*, and that Stacy has not stated and cannot state a claim for NIED under the *Chan* "zone of danger" test. Therefore, I respectfully dissent.

I.

First the material facts of this case, as alleged in Stacy's first amended complaint: On the afternoon of July 13, 2007, Stacy was alone on his 32-foot commercial fishing vessel, the *Marja*, fishing for salmon in the waters off Point Reyes National Seashore just outside of the San Francisco Bay. Stacy had his trolling gear deployed, which restricted maneuverability, and was underway at a speed of approximately 3 knots. Other vessels, including Wade's *Buona Madre*, were fishing nearby. Dense fog restricted visibility in the area to "near zero."

At about the same time, a 291-foot commercial freighter named *Eva Danielsen*—which was owned and operated by appellees—left San Francisco, bound for Portland, Oregon. At approximately 5:00 p.m., the *Eva Danielsen* entered the fishing grounds, traveling at

excessive speed, without appropriate lookouts, without sounding proper signals, without keeping proper radar watch, and otherwise proceeding in violation of International Navigation Rules that govern vessel traffic in the area.

Using radar, Stacy observed that the *Eva Danielsen* was within one mile of his vessel and appeared to be on a collision course. He established radio contact with the *Eva Danielsen*, which subsequently altered its course to avoid Stacy's vessel. Again using radar, Stacy watched as the *Eva Danielsen* passed by his vessel and continued on into the rest of the fishing fleet. The fog was too dense for him to actually see the ship, but Stacy felt the *Eva Danielsen*'s wake and heard its engine as it passed "at close quarters."

Although the *Eva Danielsen* avoided Stacy's vessel, it collided with the *Buona Madre*. Stacy alleges that the *Buona Madre* was "near" the *Marja* at the time of the collision, but he does not alleged that he saw, heard, felt, or otherwise perceived the collision contemporaneously with its occurrence.

The *Eva Danielsen* reported a collision to the Coast Guard by radio, and conducted a brief search. Following this report, Stacy proceeded north of his position to assist in the search for persons in the water. During this period, Stacy heard radio traffic expressing a belief that it was his vessel, the *Marja*, that was run down by the *Eva Danielsen*. Stacy advised all concerned that he was safe, and that the *Marja* had not been struck by the freighter. Following this report, the search was suspended and Stacy resumed fishing.

It was not until four days later, on or about July 17, 2007, that Stacy learned from other fishermen that the *Buona Madre* had been run down by the *Eva Danielsen*, and that its captain, Wade, had died after the collision. Stacy also learned that Wade had been alive after the collision, floating in the water near where Stacy had been fishing. There is no indication that Stacy knew Wade. Nor is there any allegation that Stacy knew the *Buona Madre* was among the vessels in the fishing grounds on the fateful day as the *Eva Danielsen* passed through.

Stacy filed his complaint against the owners and operators of the *Eva Danielsen* in federal court, alleging a single claim for NIED under general maritime law. Stacy alleged that, as a result of the events described in his complaint, he "was placed in grave and imminent risk of death or great bodily harm, and as a result suffered and continues to suffer great physical, mental, and nervous pain and suffering, stress and anxiety." He further alleges that he "was required to and did employ physicians and surgeons to examine, treat and care for him," and that he was also "prevented from attending to his usual occupation and thereby has lost earnings and benefits."

Relying on *Chan*, 39 F.3d 1398, the district court acknowledged that a claim for NIED is cognizable under maritime law, but it nevertheless granted the appellees' motion to dismiss Stacy's complaint for failure to state a claim upon which relief could be granted. After finding both the so-called "physical impact" test and the "relative bystander rule" inapplicable in the context of this case, the district court carefully considered whether Stacy might be able

to state a claim under the "zone of danger" theory as articulated in *Chan*. Faithfully applying the limiting test announced by this court in *Chan*, the district court concluded that he could not. Citing *Chan*, 39 F.3d at 1408, the district court explained:

> [B]ecause very few jurisdictions employ a zone of danger test that lacks a "witnessed harm" requirement, even if a maritime [NIED] claim may be brought under a zone of danger theory, the claim must be premised on the plaintiff's having experienced a "psychic injury" by "witnessing another being seriously injured or killed," while simultaneously being threatened with physical injury to him or herself.

The district court granted Stacy leave to amend his complaint, but Stacy declined. Accordingly, the district court dismissed his complaint with prejudice.

II.

In *Chan*, a three-judge panel of this court was called upon to decide whether a claim for damages for NIED is cognizable under general maritime law, and, if so, to determine the "threshold standard" for such claims under federal common law. 39 F.3d at 1408-09. A brief synopsis of the facts and holding of *Chan* is called for here, as the majority suggests the "zone of danger" test adopted by the panel in that case was mere dictum, or is somehow inapposite in the factual circumstances of this case.

A.

In *Chan*, two members of the Chan family, father Benny and daughter Samantha, were injured during a cruise on a ship chartered by the father's employer, Society Expeditions. 39 F.3d at 1401-02. On the second day of the cruise, Benny and Samantha were among a group of passengers being ferried from the ship by an inflatable raft to a coral atoll when the raft turned broadside to a wave and capsized. *Id.* at 1402. Benny and Samantha were thrown into the surf, and the pilot of the raft and another passenger died in the capsizing. *Id.* Benny sustained severe brain and head injuries, as well as other physical injuries, and Samantha sustained both physical and emotional injuries. *Id.*

The Chans filed a complaint against the owners of the ship and Society Expeditions, including claims seeking damages for emotional distress under general maritime law on behalf of Samantha, her two siblings who were not with the family on the cruise, and her mother, Victoria. Citing *Sea-Land Service v. Gaudet*, 414 U.S. 573, 585 n. 17 (1974) and *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 752 (9th Cir.1980), the district court in *Chan* dismissed all of the emotional distress claims, concluding that the mental pain and anguish of an injured party's family is not compensable in an action under general maritime law. 39 F.3d at 1408.

B.

While the *Chan* case was pending on appeal, the Supreme Court decided *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and for the first time recognized a federal common law claim for NIED—in

that case for a railroad worker subject to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). *Gottshall,* 512 U.S. at 549-50. However, because it was concerned that recognition of such claims poses "the very real possibility of nearly infinite and unpredictable liability for defendants," the Supreme Court evaluated the three major theories that *limit* the class of plaintiffs who can recover damages for NIED under state common law —i.e., the "physical impact" test, the "zone of danger" test, and the "relative bystander" test. *Id.* at 546-49. After a lengthy discussion of the evolution of the NIED tort and the policy underpinnings of the three common law tests, the Supreme Court adopted the "zone of danger" test for NIED claims brought pursuant to FELA. *Id.* at 547-548.

As articulated by the Supreme Court in *Gottshall,* recovery of damages for NIED is available under the "zone of danger" test to "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." The Court explained that is was adopting that test because it is the one that "best harmonizes" the statute's "central focus on physical perils," its intent to "encourage employers to improve safety measures in order to avoid [such] claims" and to "provide compensation for injuries and death caused by the physical dangers of railroad work," and its "broad remedial goals," with the countervailing policy concerns about "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 555-56.

C.

Following the lead of *Gottshall,* the *Chan* panel held that a claim for NIED is cognizable under general maritime law. 39 F.3d at 1408-09. But, contrary to the majority's assertion, that is not all the *Chan* panel decided. Declaring that "[w]e next must decide the threshold standard that must be met by plaintiffs bringing claims for [NIED]" under general maritime law, the *Chan* panel looked to state common law, as instructed by the Supreme Court in *Gottshall*, and proceeded to discuss the same three theories limiting recovery for NIED identified by the Supreme Court in *Gottshall*. 39 F.3d at 1409-10.

In describing the most restrictive theory, the "physical injury or impact" test, the *Chan* panel stated that it allows a plaintiff to recover emotional distress damages "only if he or she suffers an accompanying physical injury or contact." *Id.* at 1409 (citing *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir.1991), *aff'd on other grounds*, 966 F.2d 166 (5th Cir.1992), *cert. denied*, 506 U.S. 1001 (1992)). Turning to the next most restrictive theory, the *Chan* panel articulated the "zone of danger" doctrine as follows:

> Under . . . the "zone of danger" doctrine, plaintiff may recover even though there is no physical contact, so long as the plaintiff (1) witnesses peril or harm to another and (2) is also threatened with physical harm as a consequence of the defendant's negligence.

39 F.3d at 1409 (citing *Plaisance*, 966 F.2d at 168, and *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F.Supp. 837 (D. Hawaii 1992)). Finally, the *Chan* panel

described what it called the "bystander proximity" test for NIED as follows:

> The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim.

39 F.3d at 1410 (citing *Dillon v. Legg*, 68 Cal.2d 728 (1968)).

After outlining the three tests, the *Chan* panel decided that it did not need to select one of the common law limiting tests for NIED to be controlling in all cases arising in the maritime context—as the *Gottshall* Court had done in the FELA context—because none of those theories would allow recovery by the two Chan children who were not physically present on the cruise with their parents and Samantha, and because the facts alleged as to Samantha would allow her to recover under all three of the theories. 39 F.3d at 1410. What the majority overlooks in suggesting that the "zone of danger" theory articulated in *Chan* is mere dictum, however, is that the panel in that case apparently believed it *was* necessary to define the legal contours of a claim of NIED under each of the three theories, to be applied by the district court as to Victoria Chan's NIED claim after affording her a chance to amend her complaint in light of the panel's decision. *Id.* Thus, I believe the "zone of danger" test articulated in *Chan* has binding precedential force in this circuit, provides the rule of decision for this case,

and we are not free to ignore it. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).[1]

III.

The majority implies, however, that the *Chan* panel's formulation of the "zone of danger" test is inconsistent with the test adopted by the Supreme Court in *Gottshall* and subsequently applied by the Court to NIED claims arising in FELA cases, albeit in very different factual contexts. *See Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 430 (1997) (no right to recover damages for "fear of cancer" under "zone of danger" test for NIED based on mere exposure to asbestos without evidence of any "physical impact," i.e., that the plaintiff has developed asbestos-related disease); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146 (2003) (recovery allowed under "zone of danger" test for NIED where the plaintiff has been diagnosed with asbestosis, and damages for "fear of cancer" are alleged as part of the pain and suffering associated with existing asbestos-related disease). For reasons I will explain, I disagree.

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[1] I do not believe we must decide whether, in an appropriate case, a claim of NIED satisfying the "bystander proximity" or "relative bystander" test may also be recognized in the maritime context. As the *Chan* case shows, it is not at all "unlikely" that a person involved in a maritime accident—as opposed to a railroad worker covered by FELA—would have occasion to witness the death or serious injury of a close family member, whether or not that person was within the "zone of danger." 39 F.3d at 1401-02; *cf. Gottshall*, 512 U.S. at 548-49, 556.

A.

Ignoring the in-depth reasoning in Justice Thomas's majority opinion in *Gottshall,* the majority here quotes only a preliminary statement of the "zone of danger" test recited by the *Gottshall* Court, as follows:

> Perhaps based on the realization that "a near miss may be as frightening as a direct hit," the zone of danger test limits recovery for emotional injury to those plaintiffs *who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.* That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot."

512 U.S. at 547-48 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U.Fla.L.Rev. 477, 488-89 (1982)) (emphasis added). Based upon a more careful reading of *Gottshall*, however, I believe it is reasonable to conclude that the *Chan* test is consistent with *Gottshall*, at least in cases in which the plaintiff alleges a "stand-alone" claim for NIED —such as the one Stacy alleges—based on a threat of "immediate traumatic harm" which does not result in any actual physical impact or injury. *See Ayers,* 538 U.S. at 147-48 (*Gottshall* and *Buckley* describe two types of claim for negligently inflicted emotional distress: "stand-alone" claims not provoked by any physical impact or injury, for which recovery is sharply circumscribed by the zone-of-danger test; and claims for emotional distress brought on by a physical

injury, for which pain and suffering recovery has been traditionally permitted).

First, there are the facts of *Gottshall,* on the basis of which the Supreme Court found a potentially viable claim for NIED for one of the plaintiffs, Gottshall, but not for the other, Carlisle. Gottshall alleged that he suffered post-traumatic stress disorder as a result of seeing and being forced to participate in the events surrounding the collapse and death of his close friend and co-worker, Richard Johns, while they were working together on a railroad crew at a secluded job site, on an extremely hot and humid day, at an unreasonably fast pace, without any means of summoning emergency medical services after Johns suffered an apparent heat-related heart attack. *Id.* at 535-37.

Carlisle, on the other hand, alleged a claim for NIED based on his own job-related stress from working as a train dispatcher, and later as a trainmaster, who was responsible for ensuring the safe and timely movement of passengers and cargo under very difficult working conditions—including aging railstock and outdated equipment, and reductions in the work force that required him to take on additional duties and to work extremely long, erratic hours—which caused him to experience insomnia, headaches, depression, weight loss, and eventually a nervous breakdown. *Id.* at 539.

In rejecting the more flexible and expansive "foreseeability" test the Third Circuit applied to evaluate Gottshall's and Carlisle's claims for NIED, and specifically discussing the need to *limit* the class of plaintiffs eligible for recovery of damages, the

Supreme Court made the following observations regarding Gottshall's claim:

> If emotional injury to Gottshall was "foreseeable" to Conrail, such injury to the other seven members of his work crew was also foreseeable. Because one need not witness an accident to suffer emotional injury therefrom, however, the potential liability would not necessarily have to end there; any Conrail employees who heard or read about the events surrounding Johns' death could also foreseeably have suffered emotional injury as a result. Of course, not all of these workers would have been as traumatized by the tragedy as was Gottshall, but many could have been. Under the Third Circuit's standard, Conrail thus could face the potential of unpredictable liability to a large number of employees *far removed from the scene of the allegedly negligent conduct that led to Johns' death*.

512 U.S. at 553.[2] Thus, while not *explicitly* requiring that a railroad worker had to have "witnessed" his co-worker's death in order to bring a claim for NIED, this passage suggests that the Supreme Court intended to limit recovery to, at most, those members

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[2] The *Gottshall* court rejected Carlisle's claim without a great deal of analysis, finding no support in the common law for the Third Circuit's holding, "which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment." 512 U.S. at 554; *id.* at 558 (concluding that Carlisle's work-stress-related claim "plainly does not fall within the common law's conception of the zone of danger").

of the work crew who were working under the same conditions, were at the scene when Johns died, and suffered serious emotional injuries as a result of the negligent conduct of their employer that caused Johns's death.

There are also several annotations that compile the numerous state and federal cases on NIED, and support the district court's observation that "in nearly all of the cases the [*Gottshall*] Court cited as using the ["zone of danger"] test, the plaintiffs sought to recover for NIED on the basis that they had witnessed another person be injured."[3] *See, e.g., Recovery Under State*

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[3] The district court's observation on this point was quite accurate. Most of the cases cited by the *Gottshall* Court as allowing recovery damage for NIED under a "zone of danger" test involved actual physical injuries to the plaintiff, or witnessed harm to a close family member, or both. *See Gottshall*, 512 U.S. at 547-48 & n.9 (citing, inter alia, *Keck v. Jackson*, 122 Ariz. 114 (1979) (plaintiff daughter witnessed automobile collision as a result of which her mother died and she suffered serious injuries); *Towns v. Anderson*, 195 Colo. 517 (1978) (brother, standing just off front porch of house, suffered serious emotional injuries from watching gas explosion as his sister remained inside); *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546 (1983) (eight-year-old plaintiff suffered emotional injuries while watching younger brother choking nearly to death after his clothing got caught in an escalator); *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind.1991) (mother and daughter, both of whom were physically injured, brought action for emotional injuries suffered as a result of watching son killed in car accident); *Watson v. Dilts*, 116 Iowa 249 (1902) (plaintiff wife was allowed to recover for emotional injuries suffered while witnessing defendant's assault on her husband); *Stewart v. Arkansas Southern R. Co.*, 112 La. 764 (1904) (defendant's negligence caused the train on which pregnant plaintiff rode to become decoupled, causing fellow passengers to suffer bloody injuries and injuring plaintiff's back); *Purcell v. St. Paul City R.*

Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger, 89 A.L.R. 5th 255 (2010); *Recovery for Negligent or Intentional Infliction of Emotional Distress Under Jones Act* (46 U.S.C.A. Appx. § 688) *or Under Federal Employers' Liability Act* (45 U.S.C.A. §§ 51 et seq.), 123 A.L.R. Fed. 583 (2010). Indeed, some of the cases cited by the *Gottshall* Court explicitly formulate the "zone of danger" test as including a "witnessed harm" requirement—i.e., a requirement that the plaintiff witnessed harm to another. *See, e.g.*, *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990) (holding that "a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an *injury producing, sudden event*, (3) and that plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person") (emphasis added); *Rickey*, 98 Ill.2d at 556 ("[U]nder [the zone of danger rule,] a bystander who is in a zone of physical danger and who, because of the

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Co., 48 Minn. 134 (1892) (plaintiff suffered convulsions and miscarriage from shock of near collision of streetcar on which she was riding); *Pankopf v. Hinkley*, 141 Wis. 146 (1909) (defendant negligently drove his automobile into horse-drawn carriage in which pregnant plaintiff's was riding, causing her to suffer severe fright and shock resulting in a miscarriage, which the court considered "physical injuries" to her); *Garrett v. New Berlin*, 122 Wis.2d 223 (1985) (plaintiff sister could recover for emotional injuries suffered from witnessing her brother being run over by police car involved in chase)).

defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in *such proximity to the accident in which the direct victim was physically injured* that there was a high risk to him of physical impact.") (emphasis added)).[4] In light of this sizeable body of common law authority, I would conclude that the *Chan* panel's formulation of the "zone of danger" test, requiring the plaintiff to prove that he "witnessed harm or peril to another," is consistent with both the holding and the spirit of *Gottshall*.

B.

Of course, Stacy does not, and apparently cannot, allege that he witnessed the collision that led to Wade's death. He nevertheless alleges that he was in the "zone of danger" created by appellees' negligent conduct, and I have no doubt that Stacy has

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[4] The only case cited by the majority in support of its claim that "ample authorities apply[ ] the zone of danger test to direct victims, not only bystanders" is a district court decision, *Hall v. Norfolk S. Ry. Co.*, 829 F.Supp. 1571, 1576 (N.D. Ga. 1993), *see* slip op. at 9411 n.2, which surely cannot override the more recent decision of this Court in *Chan*, or this court's interpretation of the Supreme Court's decision in *Gottshall*, 512 U.S. 532, which was also decided after *Hall*. Indeed, the "zone of danger" test as formulated by *Hall* provides the majority only the thinnest of reeds to cling to, as it is drawn directly from the decision of the Third Circuit in *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 361 (3d Cir.1993), which was reversed by the Supreme Court in *Gottshall*.

adequately pleaded (although, obviously, has not yet proven) that appellees were negligently operating the *Eva Danielsen* as it passed through the fishing grounds in dense fog. However, in addition to his failure to allege that he witnessed the deadly "peril or harm" to Wade, as required by *Chan*, 39 F.3d at 1409, Stacy's pleading falters because he has failed adequately to allege that he suffered "fright" or "shock" or any other type of severe emotional distress as a result of appellees' negligent conduct while he was in the "zone of danger." Indeed, and contrary to the majority's assertion, Stacy does *not* allege that he suffered "fright" or "shock" at all—neither as the *Eva Danielsen* approached the *Marja* on a collision course, nor as it passed the *Marja* "at close quarters," nor when he heard reports that it had run down a boat in the fishing fleet, nor when he eventually learned that it had run down the *Buona Madre* and killed its captain. Rather, Stacy only vaguely claims that the entire course of events, from the moment he detected the *Eva Danielsen* on his radar until four days later, when he learned the freighter had run down the *Buona Madre* and killed Wade, caused him to suffer severe emotional distress.

To be sure, the facts presented by Stacy are tragic and compelling, which might explain the majority's effort to extend the "zone of danger" test to the present context. It is perfectly understandable that Stacy—as well as all of the other fishermen who were fishing in dense fog when the *Eva Danielsen* came steaming through their fishing grounds on July 13, 2007, especially those who assisted with the search operation after the *Eva Danielsen* collided with the *Buona Madre,* as Stacy claims he did—might suffer great psychic trauma upon learning, after the fact,

that one of their fellow fishermen died after being tossed into the ocean as a result of a collision with the freighter. They might also have suffered "survivor's guilt" for having failed to rescue Wade, who was allegedly, although unbeknownst to them at the time, still alive and floating in the water near where they had been fishing. But, again, it appears that Stacy had no way of knowing that until days later. Stacy might well have suffered additional guilt from the fact that the post-collision search was called off as a result of his report that he and his boat, the *Marja*, were safe and sound and had not collided with the *Eva Danielsen*, as the latter ship had reported. Nevertheless, even assuming all of this to be true, Stacy has not alleged that he suffered fright or shock or severe emotional distress as a result of any "immediate traumatic harm" caused or threatened by his "near miss" with the *Eva Danielsen* while he was in the "zone of danger" created by appellees' negligent conduct—such as might have resulted if he had witnessed Wade's death. To the contrary, Stacy acknowledges that after he notified the Coast Guard and his fellow fishermen that he and the *Marja* were safe and sound, he returned to business as usual, and resumed fishing.

C.

In concluding that Stacy has stated a claim upon which relief may be granted, I believe the majority conceives of a much more *expansive* "zone of danger" test than has been recognized to date by the Supreme Court, this court, or any other jurisdiction that has adopted that test. A not-so-hypothetical scenario to which many a landlubber can relate, and which is closely analogous to the facts of this maritime case,

easily illustrates the problem.[5] Imagine this: Dense tule fog on Interstate 5 in the Central Valley of California. It's a Sunday evening, anytime between November and March, any year. Moderate traffic is flowing. Clusters of big-rig trucks loaded with freight and automobiles carrying Northern Californians are returning home from a long weekend in the Southland. A large pick-up truck loaded with bales of hay roars onto the I-5 at Buttonwillow going 90 miles per hour, weaving in and out of the two northbound lanes, narrowly avoiding collisions with dozens, perhaps hundreds of other vehicles. Almost two hundred miles later, just before the pick-up reaches its destination in Tracy, it side-swipes a big rig, causing it to jackknife and collide with another vehicle, ultimately entangling dozens of other automobiles in a fiery pileup. The next morning, the San Francisco Chronicle reports that 3 people were killed in the accident, and 20 more were seriously injured.

The majority and I probably would agree that the motorists who were directly involved in such an horrific crash (including, of course, the driver of the big-rig), and those who witnessed first-hand the carnage and destruction caused by the driver of the pick-up truck *as it occurred* without suffering any direct physical impact or injury, could state a claim for NIED against that driver and any other negligent actors who caused the crash, under any formulation of the "zone of danger" test. Under the majority's reading

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[5] The following hypothetical is loosely based on actual events which have occurred with some regularity on Interstate 5 and State Route 99 in California's Central Valley in recent years. *See* http://en.wikipedia.org/wiki/Tule_fog (visited June 1, 2010).

of the *Gottshall* "zone of danger" test, however, *every one* of the hundreds, perhaps thousands, of motorists and their passengers who were "frightened" by "near misses" with the pick-up truck as it sped erratically past them on that 200-mile stretch of I-5, or who were alarmed upon learning of the fiery wreck from news reports the next day, could *also* state a claim for NIED —whether or not they witnessed the accident and, indeed, possibly even if there was no collision at all.[6]

As this hypothetical demonstrates, recovery for NIED under a "zone of danger" theory—at least in cases involving a serious "injury producing, sudden event"—will depend in large part on how broadly the "zone of danger" is defined, both in geographic and temporal terms. In my view, the expansive reach the majority gives to the "zone of danger" is not consistent with *Gottshall*. *See* 512 U.S. at 553 (rejecting theory that workers who were "far removed from the scene" of the allegedly negligent conduct that led to a co-worker's death could recover for NIED). The *Chan* formulation of the "zone of danger" test, on the other hand, is consistent with both *Gottshall* and the majority of cases recognizing a claim of NIED under that theory. It is also the law of this circuit until such time as an en banc panel of this court or the Supreme

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[6] The majority candidly acknowledges that its "zone of danger" test would have this incredibly broad reach. *See* slip op. at 9411 n.2. By the same token, every person aboard the fishing vessels in the fleet when the *Eva Danielsen* steamed through the fishing grounds at unsafe speed, and eventually ran down the *Buona Madre*, would have a viable claim for NIED if he or she was seriously upset by the events of that evening—whether or not they witnessed the collision in which Wade was killed, and no matter when they learned of his death.

Court disapproves it, and I believe we are bound to follow it. *Miller*, 335 F.3d at 893.

IV.

Because the allegations of Stacy's first amended complaint do not satisfy the "zone of danger" test for NIED as stated in *Chan*, I would affirm the judgment of the district court dismissing his complaint for failure to state a claim upon which relief may be granted.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-5487 CW
(Consolidated with
No. C 08-3586 CW)

[Filed January 15, 2009]

LORI WADE, individually and as personal representative of PAUL ALAN WADE, deceased,	)
Plaintiff,	)
v.	)
TSCHUDI SHIPPING COMPANY A.S.; REDERIET OTTO DANIELSEN; ARIES MARITIME TRANSPORT LTD.; and FIRST BALTIC SHIP MANAGEMENT A.S.,	)
Defendants.	)

ORDER GRANTING MOTION TO DISMISS PLAINTIFF BRIAN STACY'S CLAIMS

Rederiet Otto Danielsen and K/S Aries Shipping, Defendants in consolidated case No. C 08-3586, move

to dismiss consolidated Plaintiff Brian Stacy's claim against them for negligent infliction of emotional distress.[1] Plaintiff opposes the motion. The matter was heard on December 18, 2008. Having considered oral argument and all of the papers submitted by the parties, the Court grants the motion.

BACKGROUND

This case arises from the death of Paul Alan Wade[2] as the result of a maritime accident on July 13, 2007. Plaintiff is the owner and operator of the Marja, a commercial fishing vessel. According to the complaint, on the date of the accident, Plaintiff was fishing near Point Reyes National Seashore in foggy conditions "with visibility near zero." Am. Compl. ¶ 11. Plaintiff alleges that the Eva Danielsen, a large freight vessel owned and operated by Defendants, entered the fishing grounds at an unsafe speed on its way from the San Francisco Bay Area to Portland, Oregon. At approximately 5:00 p.m., Plaintiff detected the Eva Danielsen on his radar at a distance of approximately one mile. Believing the Eva Danielsen to be on a collision course with the Marja, Plaintiff established radio contact with the freighter. The Eva Danielsen initiated evasive action and avoided hitting the Marja. Although the fog prevented Plaintiff from seeing the Eva Danielsen, the ship was close enough that Plaintiff was able to hear its engine and to feel its

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[1] All generic references in this order to "Plaintiff" and "Defendants" are to Mr. Stacy and the moving Defendants, respectively.

[2] Mr. Wade is the decedent in the lead case.

wake. He also "observed by radar" that the freighter "passed at close quarters." Id. ¶ 12.

Following the Eva Danielsen's near-miss with the Marja, the freighter collided with the Buona Madre, a fishing vessel of which Mr. Wade was the captain. Although the Buona Madre was allegedly near the Marja at the time of the collision, the complaint does not allege that Plaintiff saw, heard, felt, or otherwise perceived the collision contemporaneously with its occurrence. The complaint does not clearly specify how Plaintiff learned of the collision, but it implies that it was when the Eva Danielsen reported the accident to the Coast Guard by radio. After the Eva Danielsen made its report, it allegedly performed a brief search for survivors and continued on its way. Plaintiff claims that, "[f]ollowing the report of the collision," he "proceeded north of his position to assist in looking for evidence of the reported collision and persons who may have been in the water." Id. ¶ 15. While conducting this search, Plaintiff "heard radio traffic which expressed a belief" that the collision had been between the Eva Danielsen and the Marja. Id. He "advised all concerned by radio" that the Marja had not been struck. Id. "The search was thereafter suspended and Plaintiff resumed fishing." Id.

According to the complaint, on July 17, 2007, several days after the accident, "Plaintiff learned from other fishermen that the incident in which he was involved had resulted in the death of Buona Madre's captain, Paul Wade, and that Wade had apparently been alive and floating in the water near where Plaintiff was fishing." Id. ¶ 16. As a result of the accident, Plaintiff "suffered and continues to suffer great physical, mental, and nervous pain and

suffering, stress and anxiety." Id. ¶ 22. He "was required to and did employ physicians and surgeons to examine, treat and care for him," thereby incurring "medical and incidental expenses." Id. ¶ 23. He was also "prevented from attending to his usual occupation and thereby has lost earnings and benefits." Id. ¶ 24.

Plaintiff now charges Defendants with negligent infliction of emotional distress for their failure to exercise due care as they proceeded through the fishing grounds off of Point Reyes.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court

examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. Id. at 296-97.

DISCUSSION

The Ninth Circuit has held that claims for negligent infliction of emotional distress (NIED) are cognizable under general maritime law. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1409 (9th Cir. 1994). In so ruling, the court analogized to Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994), in which the Supreme Court had recently allowed NIED claims under the Federal Employers' Liability Act (FELA). Chan directed courts to "look to state common law for guidance" in evaluating maritime NIED claims, 39 F.3d at 1409. The Ninth Circuit explained that "three main theories" limit the recovery of damages for emotional distress in the various common law jurisdictions:

> Under the most restrictive theory, the "physical injury or impact" rule, the plaintiff may recover emotional distress damages only if he or she suffers an accompanying physical injury or contact. Under the next most restrictive theory, the "zone of danger" doctrine, the plaintiff may recover even though there is no physical contact, so long as the plaintiff (1) witnesses peril or harm to another and (2) is also threatened with physical harm as a

> consequence of the defendant's negligence. The zone of danger test currently is followed in 14 jurisdictions.
>
> The third theory, adopted by nearly half the states, including California and Washington, is the "bystander proximity" rule. The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim.

Id. (citations omitted). The Chan court did not decide which of these tests should apply because the issue was not dispositive of the plaintiffs' claims under the specific facts of the case.

The Court here similarly need not determine which theory should be applied because Plaintiff has not stated a claim under any of them. It is clear that he has not stated a claim under the physical impact theory because he does not allege that he was injured by the collision. And because he does not allege that he is related to Mr. Wade, he has not stated a claim under the bystander proximity theory, either.

Whether Plaintiff can prevail under the zone of danger theory is less clear. Chan described the common law zone of danger theory as requiring that the plaintiff have witnessed "harm or peril" to another, and also have been threatened with physical harm him- or herself. In Gottshall, the Supreme Court had described the common law zone of danger theory differently. The Court explained that individuals "who sustain a physical impact as a result of a defendant's

negligent conduct, or who are placed in immediate risk of physical harm by that conduct" may recover damages. Id. at 547-48 (emphasis added). However, in nearly all of the cases the Court cited as using the test, the plaintiffs sought to recover for NIED on the basis that they had witnessed another person be injured. See, e.g., Boucher v. Dixie Med. Ctr., 850 P.2d 1179 (Utah 1992); Garrett v. City of New Berlin, 362 N.W.2d 137 (Wis. 1985); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972). Some of the cases cited in Gottshall even explicitly formulate the zone of danger test as including a "witnessed harm" requirement, i.e., a requirement that the plaintiff have witnessed harm to another. See, e.g., Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 599-600 (Mo. 1990) (holding that "a plaintiff states a cause of action for negligent infliction of emotional distress upon injury to a third person only upon a showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) that plaintiff was present at the scene of an injury producing, sudden event, (3) and that plaintiff was in the zone of danger, i.e., placed in a reasonable fear of physical injury to his or her own person"); Bovsun v. Sanperi, 461 N.E.2d 843, 848 (N.Y. 1984) (holding that "where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family"); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983) ("[U]nder [the zone of danger rule,] a bystander who is in a zone of physical

danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact.")

In Chan, the Ninth Circuit did not find that the description of the common law zone of danger test that the Supreme Court provided in Gottshall applied to NIED claims in maritime cases. Rather, it left open the question of which test should be applied and how it should be formulated. It must be noted, however, that the rationale behind the Ninth Circuit's decision in Chan to permit an NIED claim under general maritime law was that compensation should available for "the psychic injury that comes from witnessing another being seriously injured or killed." Chan, 39 F.3d at 1408 (emphasis in original).

It does not appear that state courts commonly permit recovery under a zone of danger test that lacks a "witnessed harm" requirement. Although the parties have not thoroughly discussed the elements of an NIED claim in the various common law jurisdictions, it is clear that a minority of jurisdictions employ a zone of danger test to begin with; the Supreme Court in Gottshall noted that only fourteen jurisdictions have adopted some version of the test. It is true that a few courts have allowed NIED claims by plaintiffs who have experienced fear for their own physical safety, without regard to whether they were concurrently forced to witness injury to another. See, e.g., Wall v.

Fairview Hosp. and Healthcare Servs., 584 N.W.2d 395, 408 (Minn. 1998) ("To establish a claim for negligent infliction of emotional distress, a plaintiff must show that she was within a zone of danger of physical impact, reasonably feared for her safety, and suffered severe emotional distress with accompanying physical manifestations."); Hutton v. Norwegian Cruise Line Ltd., 144 F. Supp. 2d 1325, 1327 (S.D. Fla. 2001) (applying the Gottshall formula to a maritime NIED claim). However, the more common approach among courts that have applied a zone of danger theory is to impose a "witnessed harm" requirement. See generally Dale Joseph Gilsinger, Recovery Under State Law for Negligent Infliction of Emotional Distress due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger, 89 A.L.R.5th 255 (2001).

The Court concludes that, because very few jurisdictions employ a zone of danger test that lacks a "witnessed harm" requirement, even if a maritime NIED claim may be brought under a zone of danger theory, the claim must be premised on the plaintiff's having experienced a "psychic injury" by "witnessing another being seriously injured or killed," Chan, 39 F.3d at 1408 (emphasis omitted), while simultaneously being threatened with physical injury him or herself. The Court will thus evaluate Plaintiff's allegation of NIED under Chan's formulation of the zone of danger test.

Although Plaintiff alleges that he was threatened with physical harm as a consequence of Defendants' negligence, he does not allege that he witnessed the collision between the Eva Danielsen and the Buona Madre. The complaint implies that Plaintiff learned of

a possible collision only after the fact, and did not learn that anyone had been injured or killed until several days later. Because Plaintiff did not experience a psychic injury by witnessing Mr. Wade's death, there is no basis for imposing liability on Defendants.

Plaintiff notes that Chan's formulation of the zone of danger theory allows recovery by someone who has witnessed harm or "peril" to another. However, the parties have not cited any case that addresses a claim based on witnessing "peril" that did not ultimately result in harm. Even accepting the proposition that a claim can be founded on nothing more than witnessing another person be exposed to the possibility of injury, Plaintiff did not witness Mr. Wade face the peril created by the Eva Danielsen. The Court rejects the argument that an NIED claim can be based on Plaintiff's general awareness that there were other fishing boats near him at the time the Eva Danielsen passed through. Having a suspicion that someone nearby is being exposed to danger is not tantamount to witnessing injury or death, and Plaintiff has cited no case imposing liability for NIED under comparable circumstances.

Because Plaintiff has not stated an NIED claim under any of the three tests identified in Chan, his claim is dismissed.

CONCLUSION

For the foregoing reasons, the motion to dismiss (Docket No. 11 in Case No. 08-3586) is GRANTED. Plaintiff Brian Stacy's sole claim against Defendants Rederiet Otto Danielsen and K/S Aries Shipping is dismissed. Because Plaintiff's claim against Defendant

Marinconsult Ship Management is based on the same facts and legal theory as his claim against the moving Defendants, his claim against Marinconsult Ship Management is dismissed as well. See Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related.")

Plaintiff is given leave to amend the complaint to allege, if he can truthfully do so, that he witnessed the collision between the Eva Danielsen and the Buona Madre and was contemporaneously aware that Mr. Wade had been harmed by the collision. Any second amended complaint is due within ten days of the date of this order. If no second amended complaint is filed, the complaint will be dismissed with prejudice.

IT IS SO ORDERED.

Dated: 1/15/09

CLAUDIA WILKEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND DIVISION

CASE NO.: C 07 05487 CW
[Consolidated with C 08 3586 CW]

[Filed March 11, 2009]

LORI WADE,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
TSCHUDI SHIPPING COMPANY A.S., *et al.*	)
	)
Defendants.	)

ORDER GRANTING
PLAINTIFF BRIAN STACY'S MOTION
FOR ENTRY OF JUDGMENT AND
CERTIFICATION FOR APPEAL
[Fed. R. Civ. P. 54(b)]

The motion of Plaintiff BRIAN STACY for entry of judgment and certification pursuant to Fed. R. Civ. P. 54(b) having been taken under submission on the

papers, and the Court having read and considered the supporting papers and Defendants' statement of non-opposition,

IT IS HEREBY ORDERED that the motion is granted.

The Court finds that the issues that Plaintiff Stacy wishes to appeal are entirely distinct from the issues remaining in the consolidated case of *Wade v. Tschudi Shipping Company A.S., et al.* Allowing Plaintiff Stacy to take his appeal prior to the final disposition of that action will avoid substantial delay in effecting his right to appeal and will not prejudice the remaining parties nor result in the "unnecessary duplication of efforts" at either the trial or appellate level. *Huene v. United States*, 743 Fed.2d. 703, 704 (9th Cir. 1984) Accordingly, there is no just reason for delay in the entry of a final judgment and the Clerk is therefore ordered to enter a partial judgment adjudging that Stacy shall take nothing on any of his claims and that Plaintiff Stacy and Defendants shall each bear their own costs.

IT IS SO ORDERED.

Dated: March 11, 2009

Hon. Claudia Wilken
Judge, United States
District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-05487 CW
(Consolidated with C-08-3586 CW)

[Filed March 11, 2009]

LORI WADE, et al.	)
	)
Plaintiffs,	)
	)
v.	)
	)
TSCHUDI SHIPPING COMPANY A.S., *et al.*,	)
	)
Defendants.	)
	)

PARTIAL JUDGMENT

For the reasons set forth in this Court's Order Granting Motion to Dismiss Plaintiff's Brian Stacy's Claims,

IT IS ORDERED AND ADJUDGED

That Plaintiff Brian Stacy take nothing, that Plaintiff Brian Stacy's claims be dismissed with prejudice, and that Plaintiff Brian Stacy and Defendants bear their own costs of action.

Dated at Oakland, California, this 11th day of March, 2009.

RICHARD W. WIEKING
Clerk of Court

By: /s/ Sheilah Cahill
SHEILAH CAHILL
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09-15579
D.C. Nos. 4:07-cv-05487-CW
08-cv-03586-CW

[Filed August 12, 2010]

BRIAN STACY,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
REDERIET OTTO DANIELSEN, A.S.; K.S. ARIES SHIPPING,	)
	)
Defendants - Appellees.	)

ORDER

Before: HALL, NOONAN and THOMAS, Circuit Judges.

Judge Thomas votes to deny the petition for rehearing en banc; Judge Noonan recommends denying the petition for rehearing en banc; Judge Hall recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX E

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND DIVISION

CASE NO.: C 08 3586 CW

[Filed October 10, 2008]

BRIAN STACY,

Plaintiff,

- vs -

REDERIET OTTO DANIELSEN, A.S.,
K/S ARIES SHIPPING, and
MARINCONSULT SHIP MANAGEMENT,

Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES FOR MARITIME PERSONAL INJURY

PREAMBLE

This First Amended Complaint by BRIAN STACY is filed as a matter of right before any responsive pleading has been filed or served pursuant to the provisions of Federal Rules of Civil Procedure, Rule 15(a)(1)(A). The purpose and effect of this amendment is to add MARINCONSULT SHIP MANAGEMENT as a party defendant.

PLAINTIFF ALLEGES:

JURISDICTIONAL STATEMENT

1. Jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code §1332(a)(2) on the grounds that the claims are brought by a citizen of the State of California against citizens and subjects of a foreign state and the claim for damages, exclusive of interest and costs, exceeds the jurisdictional minimum. The Complaint of BRIAN STACY is within the admiralty and maritime jurisdiction of this Court which is an alternative basis for jurisdiction, but the complaint is brought and maintained in personam and at law pursuant to the Saving to Suitor's Clause of Title 28, United States Code §1333(1).

INTRA-DISTRICT ASSIGNMENT

2. The complaint alleges injuries which occurred aboard ship on the high seas off Point Reyes,

California. There are no factors concerning intra-district assignment as set forth in Local Rule 3-2(c) applicable to this action.

VENUE

3. Venue in the Northern District of California under Title 28, United States Code §1391(d) is proper in that defendants are alien corporations subject to personal jurisdiction in the Northern District of California and subject to suit in any district.

GENERAL ALLEGATIONS

4. Plaintiff brings and maintains this action pursuant to the General Maritime Law, and to the extent applicable, the common law and statutes of the United States and the State of California.

5. Plaintiff, BRIAN STACY, is a citizen and resident of the State of California, and at all times herein mentioned, was the owner and operator of the F/V MARJA, a 32 foot commercial fishing vessel operating out of Morro Bay, California, and used to engage in commercial fishing on the high seas and navigable waters of the United States.

6. At all times herein mentioned defendants, REDERIET OTTO DANIELSEN, A.S., and K/S ARIES SHIPPING, were and are corporations organized and existing under the laws of the nation of Denmark, and defendant, MARINCONSULT SHIP MANAGEMENT, is a corporation organized and existing under the laws of the nation of Croatia.

7. Plaintiff is informed and believes and on that ground alleges that during all times herein mentioned defendants, REDERIET OTTO DANIELSEN, A.S., K/S ARIES SHIPPING, and MARINCONSULT SHIP MANAGEMENT owned, operated, chartered, managed, maintained, manned and navigated the M/V EVA DANIELSEN, a 291 foot commercial freighter of 4,286 dead weight tons designed to carry general cargo in international trade, and that same was used to engage in commerce on the high seas and navigable waters of the United States and the State of California including San Francisco Bay.

8. Plaintiff is informed and believes and thereon alleges that during all times herein mentioned, defendants and each of them were the agents of each of the other defendants, and were acting within the scope of said agency in doing the things herein alleged.

9. On the afternoon of July 13, 2007, MARJA was engaged along with a fleet of vessels including F/V BUONA MADRE in trolling for salmon in the fishing grounds off Point Reyes and was underway at a speed of less than 3 knots. Her fishing gear was deployed so that her maneuverability was restricted. Visibility in the area was restricted to near zero by a dense fog.

10. Plaintiff is informed and believes and thereon alleges that on the early afternoon of July 13, 2007, EVA DANIELSEN departed San Francisco, California, en-route to Portland, Oregon, loaded with cargo.

11. Plaintiff is informed and believes and thereon alleges that on the late afternoon of July 13, 2007, EVA DANIELSEN entered the fishing grounds off Point Reyes with visibility near zero following various

courses in a north-northwesterly direction and traveling at a speed which was unsafe for the circumstances.

12. At approximately 5:00 p.m. on July 13, 2007, while at the approximate location of 37.59 degrees North Latitude and 123.07 degrees West Longitude, Plaintiff detected a large radar contact outbound from San Francisco Bay within one mile which appeared to be on a collision course with his vessel. Plaintiff immediately attempted radio contact. Coast Guard Vessel Traffic Service identified the vessel as EVA DANIELSEN. Radio contact was established between the two vessels. EVA DANIELSEN then initiated evasive action by altering course to avoid MARJA. Though the fog prevented visual observation, Plaintiff was able to hear engine and machinery noises of EVA DANIELSEN and felt her wake. Plaintiff observed by radar that she passed at close quarters.

13. Plaintiff is informed and believes and thereon alleges that following the near miss with MARJA, EVA DANIELSEN continued on to collide with and destroy the nearby BUONA MADRE resulting in the death of her captain.

14. Plaintiff is informed and believes and thereon alleges that following the collision EVA DANIELSEN reported same by radio to the Coast Guard and following a brief search left the scene and continued on course for Oregon.

15. Following the report of the collision Plaintiff proceeded north of his position to assist in looking for evidence of the reported collision and persons who may have been in the water. During this period Plaintiff

heard radio traffic which expressed a belief that MARJA was the vessel that had been run down. Plaintiff advised all concerned by radio that MARJA had not been struck. The search was thereafter suspended and Plaintiff resumed fishing.

16. On or about July 17, 2008 and thereafter, Plaintiff learned from other fishermen that the incident in which he was involved had resulted in the death of BUONA MADRE's captain, Paul Wade, and that Wade had apparently been alive and floating in the water near where Plaintiff was fishing.

FIRST CAUSE OF ACTION
NEGLIGENT INFLICTION
OF EMOTIONAL DISTRESS
(General Maritime Law)

17. Plaintiff realleges and incorporates by reference each and every allegation above stated with the same force and effect as if the same were again set forth in full.

18. Defendants, REDERIET OTTO DANIELSEN, A.S., K/S ARIES SHIPPING and MARINCONSULT SHIP MANAGEMENT owed Plaintiff a duty to exercise due care under the circumstances to avoid exposing Plaintiff to an unreasonable risk of harm.

19. Plaintiff is informed and believes and thereon alleges that by reason of the premises aforesaid, defendants, REDERIET OTTO DANIELSEN, A.S., K/S ARIES SHIPPING and MARINCONSULT SHIP MANAGEMENT failed to exercise reasonable care under the circumstances and thereby caused EVA DANIELSEN to nearly collide with MARJA and to

collide with BUONA MADRE killing her captain and legally causing the injuries and damages to Plaintiff as herein alleged.

20. Plaintiff is informed and believes and thereon alleges that this failure of defendants and each of them to exercise reasonable care included but was not limited to the following:

a. Failure of to man EVA DANIELSEN with an adequate and competent master, officers and crew;

b. Failure to take adequate precautions while proceeding in restricted visibility;

c. Failure to sound proper fog signals;

d. Proceeding at an excessive speed under the circumstances;

e. Failure to maintain a proper lookout;

f. Failure to properly monitor and plot vessel traffic by radar;

g. Failure to maintain radar equipment in proper working order;

h. Failure to chart a proper course;

i. Failure to yield right of way to vessels fishing;

j. Failure to reduce speed to steerageway in a close quarters situation; and

k. Failure to properly maneuver the vessel to avoid a collision.

21. Plaintiff is informed and believes and on that ground alleges that the actions of REDERIET OTTO DANIELSEN, A.S., K/S ARIES SHIPPING and MARINCONSULT SHIP MANAGEMENT as aforesaid were in violation of, *inter alia*, the following provisions of the Convention on the International Regulations for Preventing Collisions at Sea, 1972, ratified by the United States and adopted by the International Navigation Rules Act of 1977, 33 U.S.C. 1601 - 1608, as amended, and commonly known as COLREGS: Rules 5, 6, 7, 8, 18, 19 and 35.

22. By reason of the foregoing Plaintiff was placed in grave and imminent risk of death or great bodily harm, and as a result suffered and continues to suffer great physical, mental, and nervous pain and suffering, stress and anxiety, all to his general damage in an amount to be proved at trial.

23. As a further legal result of the foregoing Plaintiff was required to and did employ physicians and surgeons to examine, treat and care for him, and incurred medical and incidental expenses, and will in the future incur medical and incidental expenses all in an amount to be proved at trial.

24. As a further legal result of the foregoing Plaintiff was prevented from attending to his usual occupation and thereby has lost earnings and benefits, and will lose future earnings and benefits and earning capacity all in an amount to be proved at trial.

25. The acts and omissions of defendants, REDERIET OTTO DANIELSEN, A.S., K/S ARIES SHIPPING and MARINCONSULT SHIP MANAGEMENT set forth above, and in particular in transiting a known fishing ground in near zero visibility with a loaded commercial freighter without taking proper precautions, and at an excessive speed were grossly negligent and carried on with criminal indifference and a reckless and callous disregard for the safety of Plaintiff and other vessels and mariners in the area thereby entitling Plaintiff to punitive and exemplary damages in an amount to be determined.

WHEREFORE, Plaintiff prays judgment against the defendants as follows:

1. General damages according to proof but presently claimed at $500,000;

2. Special damages as herein alleged according to proof but presently claimed at $50,000;

3. Punitive damages in an amount according to proof but presently claimed at $1,000,000;

3. The costs of suit;

4. Prejudgment interest; and

5. For such other and further relief as to the court seems proper.

Dated: October 9, 2008

LAW OFFICES OF JOHN J. HUGHES

By: /S/
John J. Hughes

APPENDIX F

John J. Hughes, Cal. State Bar #96481
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Brian Stacy

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
OAKLAND DIVISION

CASE NO.: C 07 05487 CW

[Filed January 25, 2009]

LORI WADE,

Plaintiff,

- vs -

TSCHUDI SHIPPING COMPANY A.S., *et al.*

Defendants.

BRIAN STACY,	)
	)
Plaintiff,	)
	)
- vs -	)
	)
REDERIET OTTO DANIELSEN, A.S., *et al.*	)
	)
Defendants.	)
	)

NOTICE OF INTENT NOT TO AMEND

Plaintiff, Brian Stacy, hereby gives notice to the Court and all interested parties that he does not intend to amend and will stand on his First Amended Complaint. *Lopez v. City of Needles,* 95 Fed.3rd 2022 (9th Cir. 1996)

Because his case is consolidated, Plaintiff will move the Court for judgment and certification pursuant to F.R.C.P. Rule 54(b) on the grounds that there is no just reason for delay and his claims are severable for purposes of appeal. *Huene v. United States,* 743 Fed.2d. 703, 704-705 (9th Cir. 1984).

Dated: January 25, 2009

LAW OFFICES OF JOHN J. HUGHES

By: /S/
John J. Hughes